

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>LINDA KILLMAN</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 233,268
<b>FOCUS RES-CARE</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the April 2, 2001 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on October 2, 2001.

**APPEARANCES**

Russell B. Cranmer of Wichita, Kansas, appeared for claimant. Matthew J. Thiesing of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, at oral argument before the Board, the parties stipulated that the appropriate date of accident for this claim was spring 1997 and each and every working day through December 20, 1997.<sup>1</sup> The parties also stipulated that claimant sustained a five percent whole body functional impairment as a result of her work-related injuries.

---

<sup>1</sup> The first Application for Hearing filed by claimant with the Division of Workers Compensation listed the date of accident as December 20, 1997. The amended Application for Hearing filed with the Division identified the date of accident as April 1, 1997, "as well as a series of subsequent work accidents." But at the regular hearing, claimant's attorney initially stated the dates of accident were "spring of '97 and August 1st of '97." At the same hearing, claimant's attorney later stated that they were claiming a series of accidents and that December 20, 1997, may have been the last date. On the other hand, claimant's submission letter stated the parties had stipulated to the following dates of accident: on or about April 1, 1997, and August 1997. Conversely, in the April 2, 2001 Award the Judge noted in the stipulations section that the alleged date of accident was spring 1997 and each and every working day through December 20, 1997. Because of the various dates, at oral argument the Board asked the parties to identify the appropriate accident dates.

**ISSUES**

In the April 2, 2001 Award, Judge Clark determined that claimant injured her back due to the work that she performed for respondent and awarded her a five percent permanent partial general disability. Finding that claimant did not make a good faith effort to obtain appropriate employment following her injury, the Judge limited claimant's permanent partial general disability to her functional impairment rating without first addressing her post-injury ability to earn wages.

Claimant contends Judge Clark erred. Claimant argues that she made a good faith effort to find appropriate employment and, therefore, she should be awarded a 59 percent work disability (a permanent partial general disability greater than the functional impairment rating), which is based upon a 100 percent wage loss and an 18 percent task loss. In the alternative, claimant argues that her wage loss percentage should be determined by imputing a post-injury wage based on her ability to earn wages when determining her permanent partial general disability.

Claimant also contends respondent and its insurance carrier underpaid claimant's weekly temporary total disability benefits, with the amount of underpayment depending upon the determination of claimant's average weekly wage and the appropriate weekly benefit rate. Because respondent and its insurance carrier failed to provide requested information concerning claimant's average weekly wage and information concerning the temporary total disability benefits and medical benefits that they had paid, claimant requests the Board to remand this claim to the Judge for taking additional evidence.

Conversely, respondent and its insurance carrier contend the Award should be affirmed. They argue the Judge impliedly found that claimant retained the ability to earn a comparable wage and, therefore, claimant's permanent partial general disability was properly limited to the functional impairment rating.

The issues before the Board are:

1. What is the nature and extent of claimant's injury and disability?
2. What is claimant's average weekly wage?
3. Did claimant, following her injury, make a good faith effort to find appropriate employment?
4. If not, what post-injury wage should be imputed to claimant?
5. Is claimant entitled to additional temporary total disability benefits due to an underpayment of the weekly benefit rate?

6. Should the claim be remanded to the Judge for taking additional evidence regarding claimant's average weekly wage because respondent and its insurance carrier failed to comply with the Judge's order that they furnish claimant with wage information and also failed to provide the amount of temporary total disability and medical benefits that had been paid?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Board finds and concludes:

This claim should be remanded to the Judge for the following reasons: (1) for respondent and its insurance carrier to comply with the Judge's order to provide wage information, (2) for respondent and its insurance carrier to provide the amount of medical benefits along with the amount and weeks of temporary total disability benefits paid, (3) for the Judge to make findings regarding claimant's post-injury ability to earn wages, and (4) for the Judge to recompute the award after considering the newly provided information regarding wages and temporary total disability benefits.

At the regular hearing, the Judge noted that claimant's average weekly wage was an issue to be decided in this claim. The Judge then ordered respondent and its insurance carrier to provide claimant with a wage statement and directed the attorneys to work on a wage stipulation. Respondent and its insurance carrier failed to comply with that order.

In addition to the wage information, at the regular hearing respondent and its insurance carrier also lacked information regarding the amount of medical compensation and temporary total disability compensation that they had paid in this claim. Respondent and its insurance carrier's attorney then represented that information would need to be submitted at a later time. Respondent and its insurance carrier did not provide the information, which was necessary to properly determine claimant's award.

At the regular hearing, claimant's counsel noted that temporary total disability benefits may have been underpaid, depending upon the average weekly wage calculation.

The Judge entered the April 2, 2001 Award without having the wage information that had been ordered and without the information respondent and its insurance carrier represented they would provide. The Judge then computed the award as if claimant had not been entitled to receive any temporary total disability benefits, which reduced the total number of weeks of benefits that claimant would have otherwise received.

Absent the average weekly wage information from respondent and its insurance carrier, the Judge appropriately adopted claimant's testimony to compute the average weekly wage. But claimant did not know the value of additional compensation items, which respondent and its insurance carrier also failed to provide, making it necessary to remand

the claim for respondent and its insurance carrier to provide the cost or value of the fringe benefits provided to claimant.

The issue now before the Board is whether respondent and its insurance carrier should be allowed to reap possible benefit for failing to provide the temporary total disability benefit information that they represented they would provide, or benefit for failing to comply with a judge's direct order to provide wage information – information that regulations require to be available at the regular hearing. K.A.R. 51-3-8 provides that the parties shall be prepared at the first hearing to agree on the worker's average weekly wage. Subsection (c) of the regulation requires employers and their insurance carriers to have payroll records at the hearing in order to answer any questions that may arise regarding the worker's average weekly wage. K.A.R. 51-3-8 also provides that one of the questions that will be asked at the regular hearing is what medical and hospital treatment has been furnished.

The Board concludes that respondent and its insurance carrier should not benefit for failing to comply with the Judge's direct order. Accordingly, the Board concludes the matter should be remanded for respondent and its insurance carrier to comply with the Judge's order to provide the appropriate wage information for computing claimant's average weekly wage and for respondent and its insurance carrier to provide the amount of medical benefits along with the amount of and the weeks for which temporary total disability benefits were paid.

Upon remand, the Judge is also directed to make a finding regarding claimant's post-injury ability to earn wages. The formula for determining claimant's permanent partial general disability is set forth in K.S.A. 1997 Supp. 44-510e, which requires an average of a worker's task loss percentage with the worker's wage loss percentage. But Copeland<sup>2</sup> holds that a worker's wage loss percentage should be determined by comparing a worker's actual pre-injury average weekly wage with an imputed post-injury wage (rather than an actual post-injury wage) when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. The Court stated, in part:

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . . (Copeland, p. 320.)

In the Award, the Judge found that claimant failed to make a good faith effort to find appropriate employment. But the Judge did not address claimant's post-injury ability to earn wages. The Board requests the Judge to address that question of fact upon remand.

Based upon the above, the remaining issues are rendered moot.

---

<sup>2</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

**AWARD**

**WHEREFORE**, the Board remands the April 2, 2001 Award to the Judge for (1) respondent and its insurance carrier to comply with the Judge's order to provide wage information, (2) respondent and its insurance carrier to provide the amount of medical benefits along with the amount and weeks of temporary total disability benefits paid, (3) the Judge to make findings regarding claimant's post-injury ability to earn wages, and (4) the Judge to recompute the award after considering the newly provided information regarding claimant's wages and temporary total disability benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 2001.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

- c: Russell B. Cranmer, Attorney for Claimant  
Matthew J. Thiesing, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director